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ROSMAWATI ISMAIL v. PIHAK BERKUASA TATATERTIB MAJLIS BANDARAYA PULAU PINANG & ANOR

HIGH COURT MALAYA, PULAU PINANG
ANAND PONNUDURAI J
[JUDICIAL REVIEW NO: PA-25-53-10-2020]
9 JUNE 2022

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Abstract – *Public authorities have a duty to provide reasons for their decisions in dismissing their officers, even if no express stipulation of such a requirement exists to do so. The duty to provide reasons is not grounded only for reasons of fairness but is also for good administration. This is especially so when one considers that a dismissed officer suffers losses as a result of the dismissal which affects his/her livelihood.*

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ADMINISTRATIVE LAW: *Judicial review – Application for – Judicial review against decision of statutory authority – Dismissal from service – Allegation of misconduct – Whether there was inordinate delay causing any prejudicial to applicant – Whether dismissal and termination of applicant's employment legally valid – Whether effective – Whether public authorities required to provide reasons for dismissal – Whether decision irrational*

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The first respondent was a statutory authority established under s. 16(4) of the Local Government Act 1976 ('LGA') and its officers were determined and fixed by the same provision. The second respondent was a local authority established under the LGA by the State Authority of Pulau Pinang and has jurisdiction over all local Government matters in Pulau Pinang. It

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was also responsible for the conduct and discipline of all its officers and employees pursuant to ss. 16 and 17 of the LGA. The applicant commenced her employment with the second respondent in 2004, as an enforcement assistant. She was subsequently promoted to the position of an assistant auditor and acted in the position of auditor, from 2007 to 2013. It was in

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2013 that she was formally appointed as Juru Audit Grade 41. The second respondent had issued the applicant a show cause letter containing an allegation of misconduct, to which the applicant replied and provided her explanation. Through another letter from the second respondent, the applicant was transferred temporarily, from being the head of unit audit to

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treasury (perbendaharaan) to allow the Jawatankuasa Khas Penyiasatan Tatakelakuan Anggota MBPP to carry out an investigation on her. Subsequently, about four months later, the second respondent issued another show cause letter with a further eight allegations. The applicant again provided her written explanation but the second respondent did not respond

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to indicate whether the explanation was accepted or not. It was some eight months after the applicant's second explanation that the first respondent issued the applicant a letter ('charge letter'), pursuant to r. 35 of Kaedah-

kaedah Pekerja (Kelakuan dan Tatatertib) Majlis Perbandaran Pulau Pinang 2000. In the charge letter, the applicant was (i) informed that the first respondent had received a report and after considering all the information, the first respondent was of the opinion that disciplinary action with a view of dismissal or demotion should be taken against her; and (ii) requested a written representation within 21 days stating the grounds she wished to rely on to exculpate herself. In response, the applicant sent a letter providing her explanation and reasons why she was not guilty of the two charges levelled against her. Some ten months later, the applicant received a letter dated 9 July 2020, informing her that she was dismissed from service with immediate effect. In this judicial review against the said dismissal, the applicant sought the following reliefs: (i) an order of *certiorari* to quash the whole decision of the second respondent; and (ii) a declaration that the dismissal and termination of the applicant's employment was not legally valid and not effective and the applicant was still an employee of the second respondent and entitled to salaries and all other benefits eligible to be received. The applicant submitted that, *inter alia*, (i) the dismissal took place on 9 July 2020, which was almost two years after the initial show cause letter dated 6 August 2018. During this period, the applicant continued to receive bonuses. As such, taking all these facts together as well as the delay, the misconduct (if any) had been condoned and she ought not to have been dismissed; and (ii) the alleged misconducts have not been proven and the respondents failed to provide reasons for the applicant's dismissal.

Held (granting order of *certiorari* and declaration prayed for):

(1) The first two letters to show cause were not disciplinary actions *per se* by the second respondent. They were similarly not charges levelled against the applicant. They were commonly known as show cause letters issued by the second respondent as employer upon receiving complaints about the applicant with a view to eliciting the applicant's response to those complaints. Investigating disciplinary matters can take time and, in any event, there is no time limit prescribed in the disciplinary rules to institute and complete disciplinary proceedings. This does not mean that an employer can prolongate a disciplinary matter taking no action indefinitely. Disciplinary matters should progress timeously with all reasonable efforts taken to investigate and prosecute the same. On the facts of this case, bearing in mind the nature of the allegations and the chronology of the events, it could not be concluded that there was any inordinate delay causing any prejudicial consequence to the applicant. She did remain at all material times, in employment until the final determination of the charges against her. There was no condonation by the respondents. Similarly, as for the payment of bonuses for the period between 2018 and 2020, this *per se* did not support the argument that the matters complained of were condoned. (paras 35-37)

(2) The first respondent's dismissal letter did not provide any reason for the dismissal. There was nothing before the court that could in any manner substantiate the charges against the applicant. The respondents clearly failed to give any reason why they had concluded that the applicant failed to exculpate herself. There is a duty cast on public authorities to provide reasons for their decisions, even if no express stipulation of such a requirement exists to do so. The duty to provide reasons is not grounded only for reasons of fairness but is also for good administration. This is especially so when one considers that the applicant had suffered losses as a result of her dismissal and which had affected her livelihood. (paras 54-57 & 59)

(3) In light of the nature of the charges and the response by the applicant in her written representations, this was certainly a case that required further clarification and the disciplinary board ought to have appointed a committee of investigation to allow her to appear personally and the opportunity to exculpate herself. (para 65)

(4) On the basis that no reasons were provided as well as a total lack of evidence on the two charges, the respondents' decision to dismiss the applicant was irrational and could not stand. The first respondent failed to sufficiently consider the applicant's defences. If it had, it would certainly be able to provide reasons for saying they were not exculpatory. Such failure to give reasons for rejecting the applicant's representation and thereby dismissing her from service rendered such decision invalid. The decision not to appoint a committee of investigation was also irrational. (paras 69 & 70)

Case(s) referred to:

Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal [2018] 2 CLJ 513 FC ***(refd)***

Dev Singh v. Punjab Tourism Development Corporation Ltd & Anor [2003] AIR 3712 SC ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

Mohd Sobri Che Hassan v. Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor [2018] 2 CLJ 715 CA ***(refd)***

Nazrul Imran Mohd Nor v. Civil Service Commission Malaysia & Anor [2021] 10 CLJ 737 CA ***(refd)***

Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 FC ***(refd)***

Norizan Bakar v. Panzana Enterprise Sdn Bhd [2013] 9 CLJ 409 FC ***(refd)***

Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors [2021] 2 CLJ 808 CA ***(refd)***

R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Sam Maark Verak v. Dato' Zainal Abidin Ahmad & Ors [2022] 3 CLJ 661 CA ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 CA ***(refd)***
Yahaya Talib v. Southern Bank & Anor [2009] 1 LNS 1785 HC ***(refd)***
Z Sudimo & Anor v. Rustenburg Platinum Mines Ltd & Ors [2007] ZACC 22 ***(refd)***

Legislation referred to:
Federal Constitution, art. 5(1)
Kaedah-Kaedah Pekerja (Kelakuan dan Tatatertib) Majlis Perbandaran Pulau Pinang 2000, rr. 10(2)(a), (h), 32, 33, 34, 35, 46(1)(g)
Local Government Act 1976, ss. 13, 16(4), 17
Rules of Court 2012, O. 53 rr. 2(3), 3(2)

Reported by Lina E

JUDGMENT

Anand Ponnudurai J:

Introduction

[1] This case is yet another where an employee sought intervention from the High Court by way of judicial review against an order of dismissal by a Local Government Authority.

[2] This court had on the 2 November 2020, pursuant to O. 53 of the Rules of Court 2012, granted the applicant leave to apply for a judicial review of her dismissal and for the following reliefs:

(i) an order of *certiorari* to quash the whole decision of the Majlis Perbandaran Pulau Pinang which dismissed the applicant on 9 July 2020 following disciplinary action against the applicant *vide* a show cause letter dated 29 August 2019 wherein the said dismissal of employment is not legally valid and not effective; and

(ii) a declaration that the dismissal and termination of the applicant's employment from Majlis Perbandaran Pulau Pinang on 9 July 2020 is not legally valid and not effective and the applicant is still an employee of Majlis Perbandaran Pulau Pinang and entitled to all salaries and all other benefits eligible to be received.

[3] The background facts were set out in the several affidavits filed by the parties. I will proceed to layout those facts, the applicable law, the rival contentions and thereafter my analysis of the same with the view of determining whether the applicant's application herein is with merits.

The Background Facts

[4] The first respondent is a statutory authority established under s. 16(4) of the Local Government Act 1976 (herein referred to as "LGA") and its officers are determined and fixed by the same provision.

[5] The second respondent is a Local Authority established under the LGA by the State Authority of Pulau Pinang and has jurisdiction over all local Government matters in the Island of Pulau Pinang. It is also responsible for the conduct and discipline of all its officers and employees pursuant to ss. 16 and 17 of the LGA.

[6] Pursuant to s. 13 of the LGA, the second respondent is deemed a body corporate and may sue or be sued.

[7] The applicant commenced her employment with the second respondent on 1 March 2004 as an enforcement assistant. She was subsequently promoted to the position of assistant auditor on 31 January 2006. She then acted in the position of auditor from 19 October 2007 to 2 June 2013. On 17 April 2013 she was formally appointed as juru audit grade 41.

[8] The extensive scope duties and functions of the applicant as the head of the internal audit unit are those as set out in exh. R-5.

[9] On 6 August 2018, the second respondent issued the applicant a show cause letter containing an allegation of misconduct. In response, the applicant replied and provided her explanation by way of a letter dated 13 August 2018.

[10] Thereafter, through a letter on 21 Sept 2018 from the second respondent, the applicant was transferred temporarily from being the head of unit audit to treasury (perbendaharaan) to allow the Jawatankuasa Khas Penyiasatan Tatakelakuan Anggota MBPP (JKPTAM) to carry out an investigation on her. As it turned out, this transfer was effective until the date of her dismissal, almost two years later, in July 2020.

[11] Throughout the period 2018 to 2020, the applicant was paid bonuses *ie*, a month's bonus for 2018, a ½ month bonus for 2019 and a ½ month bonus for 2020.

[12] Subsequently, about four months later, the second respondent issued the applicant another show cause letter dated 4 December 2018 with a further eight allegations. The applicant again provided her written explanation by way of a letter dated 10 December 2018. The second respondent never favoured the applicant with any response thereafter to indicate whether the applicant's explanation to the two show cause letters were accepted or not.

[13] Only after some eight months after her second explanation did the first respondent, on 29 August 2019, issue the applicant a letter pursuant to r. 35, Kaedah-Kaedah Pekerja (Kelakuan dan Tatatertib) Majlis Perbandaran Pulau Pinang 2000 (hereinafter referred to as the "Regulations").

[14] In the said letter of 29 August 2019 (hereinafter referred to as the 'charge letter') the applicant was informed that the respondent had received a report and that after considering all the information, the first respondent was of the opinion that disciplinary action with a view of dismissal or demotion should be taken against her for the following two charges:

> Pertuduhan Pertama:
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> Bahawa puan, Rosmawati binti Ismail semasa bertugas di Unit Audit Dalam sebagai Ketua Audit Dalam telah bertindak mengarah Encik Akbar bin Kamarudin, Pembantu Kesihatan Awam Gred U19 selaku penyelia kepada Encik Mohd Rithaudden bin Mohd Ramli, Pembantu Awam Gred H11 iaitu suami kepada puan supaya datang ke bilik puan pada 13 Disember 2017 sekitar jam 1.00 tengahari bagi mengisi maklumat ketidakhadiran dan mengesahkan serta menandatangani rekod kehadiran Perakam Waktu Elektronik (PWE) suami puan dengan niat bagi membolehkan beliau layak menerima Bantuan Khas Kewangan Kedua (BKK-2) Tahun 2017.
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> Pertuduhan Kedua:
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> Bahawa puan, Rosmawati binti Ismail semasa bertugas di Unit Audit Dalam sebagai Ketua Audit Dalam telah menghadiri suatu perbincangan sewaktu kunjungan hormat ke atas YAB Ketua Menteri anjuran Parti Amanah Negara (PAN) pada 9 Oktober 2018 jam sekitar 2.15 petang bertempat di Bilik Sidang Akhbar, Pejabat Ketua Menteri, Tingkat 28, KOMTAR. Sewaktu perbincangan tersebut, Tuan Haji Mohamed Yusoff bin Mohamed Noor selaku Ketua PAN kawasan Tanjung telah membangkitkan mengenai proses siasatan yang sedang dijalankan ke atas puan dengan niat bagi mendapatkan sokongan serta simpati YAB Ketua Menteri. Tindakan ini jelas memperlihatkan bahawa puan telah cuba menggunakan pengaruh luar bagi tujuan menyokong kepentingan peribadi puan.

[15] The applicant was also requested to make a written representation within 21 days stating the grounds she wished to rely on to exculpate herself. In response, the applicant thereafter sent her letter dated 30 September 2019 providing her explanation and reasons why she was not guilty of the two charges levelled against her.

[16] Some ten months later, the applicant received a letter dated 9 July 2020 informing her that she was dismissed from service with immediate effect.

The Law

[17] Learned counsel for the respondents relied on several decided cases and contended that this court should not rehear a case or investigate its merits and is restricted to merely reviewing the decision-making process of the tribunal or disciplinary authority. He however conceded that decisions may

be reviewed by the High Court by way of judicial review on established grounds such as illegality, irrationality, procedural impropriety and possibly proportionality.

[18] There is no doubt that the principles of law relating to judicial review has undergone much change in the last two decades since the decisions of the Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317 and that of the Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145. Whilst it may generally be considered by some that there is not much difference between an appeal and a judicial review, in my view, there is still a juristic difference between the two and the court should be mindful not to transgress the line between them. In this regard, I can do no better than to refer to the following paragraphs of the decision of the Court of Appeal in the case of *Sam Maark Verak v. Dato' Zainal Abidin Ahmad & Ors* [2022] 3 CLJ 661 which I am in agreement with.

[19] In the said decision of *Sam Maark*, His Lordship Darryl Goon JCA had an opportunity to consider the inroads made in the law relating to judicial review and had enunciated as follows:

> [35] While the principles relating to judicial review have evolved, there is still a difference in the extent of the court's powers in a judicial review, when compared to an appeal properly so-called. The latitude for appellate intervention in a decision of a court of first instance is wider than when the court exercises its judicial review powers over non-judicial tribunals. The latter is the exercise of a supervisory jurisdiction developed by the common law while the former is an appellate jurisdiction derived from statute.
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> [36] It is, in this respect, worthwhile to refer to what Edgar Joseph Jr FCJ said in *R Rama Chandran*, at pp. 176-177 (CLJ); p. 191 (MLJ):
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> > The starting point is to define 'Judicial Review'. According to 37 *Halsbury's Laws* (4th Ed) para 567, the process of Judicial Review is that:
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> > > ... by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.
> >
> > Next, it is necessary to compare appellate review jurisdiction with supervisory review jurisdiction. It is clear law that appellate review jurisdiction is solely a creature of statute while supervisory review jurisdiction is the creature of the common law and is available in the exercise of the courts' inherent power but, I would hasten to add, its extent may be determined not merely by judicial development but also by legislative intervention. As Abbott CJ put it succinctly in *R v. Cashiobury Hundred Justices* (1823) 3 Dow & Ry 35; 26 RR 604:

> [Supervisory review] always lies, unless it is expressly taken away, and an appeal never lies, unless it is expressly given by statute ...

It is true that both appellate review and supervisory review are concerned with the correction of error but, it has often been said, that they are radically different processes.

Where statute provides simply for an appeal, the appellate court has power to re-hear the whole case and, when satisfied that the judgment appealed against cannot stand, it may set aside the judgment and make such orders as ought to have been made at first instance. Thus, appellate jurisdiction is concerned with the merits of a case.

[37] In *R Rama Chandran*, Edgar Joseph Jr FCJ expressed, by reference to the schedule in the Courts of Judicature Act 1964, that:

> ... it would be wrong to assume that the extent of the power of the courts in Malaysia in the field of Public Law remedies is limited in the same manner as that of the courts in the United Kingdom, where there are no such equivalent provisions.

[38] This wider power that exists was spoken of by Edgar Joseph Jr FCJ in the context of the power to mould the remedy that a court may afford an applicant to suit the justice of the case. As His Lordship stated:

> The need for such a wider power is illustrated by the case of *Chief Constable of North Wales Police v. Evans* where the House of Lords was struggling to mould the remedy to suit the justice of the case. ...
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> Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.
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> On the other hand, having regard to the rapidly developing law in applications for Judicial Review, whenever legally permissible, we must demonstrate a willingness to mould the remedies available to suit the justice of the case.

[39] The limits within which courts may exercise its supervisory power of review is, at this point in time, quite settled. It is where the decision challenged may be said to be marred by illegality, irrationality or procedural impropriety. The meaning for each of these heads of challenge have also been the subject of judicial explanation and their respective ambits are sufficiently clear. They stem from the decision of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 and in particular, the speech of Lord Diplock. However, Lord Diplock was hesitant in adopting the principle of proportionality stating that, "I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative

> law of several of our fellow members of the European Economic Community; ... In fact, shortly after *R Rama Chandran,* Edgar Joseph Jr FCJ in *Majlis Perbandaran Puiau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65; [1999] 3 MLJ 1, after referring to the decisions in several English cases, applied the principle of proportionality in that case stating that, "... the severity of the requirements of the disputed condition would be out of all proportion to the extension of planning permission sought." Since then the principle of proportionality in judicial review has gained much momentum (see *Dr Lourdes Dava Raj Curuz Durai Raj v. Dr Milton Lum Siew Wah & Anor* [2020] 9 CLJ 192; [2020] 5 MLJ 185; *Nazrul Imran Mohd Nor v. Civil Service Commission Malaysia & Anor* [2021] 10 CLJ 737; [2021] 6 MLJ 750; I*szam Kamal Ismail v. Prestij Bestari Sdn Bhd; Majlis Peguam Malaysia (Intervener)* [2017] 10 CLJ 417; [2018] 5 MLJ 536). Proportionality also has a constitutional dimension but which is not relevant for the purposes of this case (see the discussion in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] 1 MLJ 750; *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147; [2020] 5 MLJ 277; *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2007] 1 CLJ 19; [2006] 6 MLJ 213).
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> [40] The foregoing basic principles have been reiterated to underscore the fact that there still remains a fundamental juristic difference between an appeal and a judicial review. The court should therefore be mindful not to transgress the line between the two that is delineated by the tests and principles of illegality, irrationality, procedural impropriety and proportionality.

[20] During the course of the hearing of this matter, it became clear that learned counsel for the applicant was relying on a recent decision of the Court of Appeal in the case of *Nazrul Imran Mohd Nor v. Civil Service Commission Malaysia & Anor* [2021] 10 CLJ 737; [2021] 6 MLJ 750 to support the application herein. Due to the similarity of the facts and the heavy reliance placed on such decision, I think it apt to set out the facts of that case, the outcome/decision and the legal principles that can be derived from it.

[21] The facts in that case were these. Encik Nazrul was a diplomatic officer with the Ministry of Foreign Affairs and was stationed at Manila at the time he posted some comments on his Facebook account which allegedly tarnished the image of the Government. Disciplinary proceedings were commenced pursuant to similar applicable regulations there with the intention of dismissal or reduction in rank. A show cause letter with a charge was presented against Nazrul and he was given 21 days to furnish a written representation to exculpate himself, which he duly furnished. In his representation, whilst Nazrul didn't deny posting the comment, he nonetheless explained that it had been misinterpreted and distorted and that it did not tarnish the image of the Government. It is to be noted that Nazrul did not in his written representation request for an oral hearing nor for any documents.

[22] The disciplinary authority there was of the view that the written representation did not exculpate him and proceeded to dismiss Nazrul. A

[23] Nazrul then commenced judicial review proceedings for an order of *certiorari* to quash the decision dismissing him and for a declaration that he was still an employee of the Ministry. Nazrul's application did not find favour with the learned High Court Judge and it was dismissed for *inter alia* the following reasons; B

(i) That the court in a judicial review application should not hear the merits but be concerned more with the decision-making process;

(ii) That the court will not substitute its judgment or discretion for the judgment or discretion of the body under review; C

(iii) That the decision of the PSC that the representation did not exculpate Nazrul from the charge was up to them to decide and wasn't irrational;

(iv) It was up to the disciplinary authority and not the court to decide if the representation was exculpatory; D

(v) On Nazrul's contention that the punishment of dismissal was too harsh, reliance was placed on the Federal Court decision of *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 CLJ 405; [1998] 1 MLJ 153 that it is for the employer to decide the appropriate punishment; and E

(vi) On the issue of procedural impropriety, there was none as there was no request for an oral hearing from Nazrul.

[24] Nazrul then filed an appeal against the decision of the High Court and which appeal was heard by the Court of Appeal comprising Mohamad Zabidin Diah JCA (as His Lordship then was) Abu Bakar Jais and Darryl Goon Siew Chye JJCA. The appeal was allowed but it is the reasons for allowing the same that I find compelled to set out. F

[25] Firstly, the Court of Appeal found that that the learned High Court Judge had erred on the issue of the court being limited to examining only for process and not substance. It also concluded that the learned High Court Judge had erred in concluding that it was up to the PSC to decide if Nazrul had exculpated himself. In this regard the Court of Appeal referred extensively to the decisions of the Federal Court in *R Rama Chandran v. Industrial Court Of Malaysia & Anor* (*supra*); *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 as well as *Akira Sales & Services (M) Sdn Bhd v. Nadiah Zee Abdullah & Another Appeal* [2018] 2 CLJ 513; [2018] 2 MLJ 537 and came to the following conclusions: G H

> [51] It is therefore, clear that by the reason of the decision of the apex court in *Akira* above, even the substance or merits of a decision of an inferior tribunal may be reviewed by the courts. I

A [52] The third case of the Federal Court which supports the proposition that the merits or substance of an inferior tribunal or a decision-making body could be challenged and subjected to review is *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629. In this case, Raus Sharif FCJ (later CJ) said as follows:

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> [15] We find that there is merit on the submission advanced by the learned counsel for the respondent. Historically, judicial review was only concerned with the decision-making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroads into this field of administrative law. *Rama Chandran* is the
C mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunals may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter.

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[53] *R Rama Chandran*, *Akira* and *Ranjit Kaur* are authorities from the highest court to say unequivocally the merits of the decision of PSC can be probed and questioned by the courts. Thus, these authorities recognised in essence the supervisory function of the courts to scrutinise the decision made.

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[54] With the explanation above, we would conclude that this court in exercising its appellate function has the power to review and examine the substance and merits of the decision of the PSC. We intend to do so and the elaboration on our exercise in this regard, is as follows ...

[57] Thus, based on the above authority, to reiterate, the four grounds
F upon which the decision of the first respondent may be challenged by way of judicial review are as follows:

(a) illegality;

(b) irrationality;

G (c) procedural impropriety; and

(d) proportionality.

[26] The above principles enunciated by the Court of Appeal are therefore to be applied. In my considered view, in order to ascertain if a decision is tainted with illegality, irrationality, procedural impropriety or possibly
H proportionality, it cannot be gainsaid that the court has to some extent review and examine the decision of the disciplinary authority against the merits of the case that is to say, the nature of the charges, the facts, evidence led and any other relevant feature in the case.

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[27] In light of the above, I will now proceed to analyse the facts of this case in greater detail, including the rival contentions, with a view to determining if the decision of the first respondent to dismiss the applicant is wanting for reasons of illegality, irrationality, procedural impropriety and / or proportionality.

The Grounds Of The Application

[28] The applicant had in her affidavits and written submissions relied on several grounds to support this application. They were, *inter alia*, that the respondents had failed to comply with the relevant rules, the applicant was not provided with the necessary documents and evidence supporting the charges, breach of the rules of natural justice, the absence of evidence to justify the termination, the irrationality of the decision to dismiss the applicant, the applicant not being allowed to mitigate, the punishment was not proportionate, and that the respondent had condoned her alleged misconduct.

[29] The respondent at the outset relies on various authorities such as that of the Federal Court in the case of *Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333; [1994] 2 MLJ 114 and contends that most of the above grounds ought not to be entertained as they were not set out with sufficient particularity in the statement filed pursuant to O. 53 r. 3(2) of the Rules of Court 2012 and that case law dictates that an applicant is limited to the grounds set out therein. It is necessary therefore to set out the grounds set out by the applicant in its statement which, translated into English, were as follows:

(i) the respondents failed to consider and take into account trite and applicable law regarding the dismissal from employment from the aspect of fairness and facts of the case;

(ii) first respondent failed to consider and to take into account the principles of natural justice wherein the dismissal is unlawful and not effective from the aspect of procedural and substantive fairness;

(iii) first respondent failed to take into account the principle of natural justice wherein the applicant was not given the opportunity to 'defend herself' before the decision to dismissal was made by the respondent;

(iv) first respondent failed to consider and to take into account the explanation or evidence of the applicant;

(v) first respondent failed to consider and to take into account relevant matters and /or had wrongly applied the legal principles in dismissal actions;

(vi) first respondent took into account the evidence and documents which were adverse to the applicant's case. The process undertaken by the first respondent infringed the principle of natural justice and/or tainted with procedural impropriety; and

(vii) first respondent had erred in law and/or exceeded its jurisdiction when:

(a) first respondent failed/refused to consider all relevant facts and material in reaching its decision.

(b) Decision made by first respondent was contrary and unlawful/unreasonable in the sense that no reasonable person would have arrived at such a decision on the facts before it.

[30] It can certainly be said that the O. 53 statement could have been drafted with better particularity of the complaints and grounds for the application. These particulars have however been set out in greater detail in the various affidavits.

[31] In my considered view, the contents of the O. 53 statement have sufficiently set out the various grounds relied upon in the application herein. Further, the respondents were not misled or unaware of the grounds relied upon by the applicant as they have responded to each one of them in much detail in both their various affidavits as well as in their written submissions.

[32] As such, having set out the applicable law, I shall now consider the grounds advanced by the applicant *seriatim*.

Condonation

[33] As seen from the narration of facts earlier, the dismissal of the applicant took place on 9 July 2020 which was almost two years after the initial show cause letter dated 6 August 2018. It was also not disputed that in relation to the first two show cause letters, the applicant had given lengthy replies *via* letters and there was no response from the second respondent to them.

[34] It is also not disputed that the applicant continued to receive bonuses during this period. As such, taking all these facts together as well as the delay, the applicant contends that the misconduct (if any) has been condoned and that she ought not to have been dismissed.

[35] I have no hesitation in holding that there is no merit in this submission of "condonation". Firstly, the first two letters to show cause were not disciplinary actions *per se* by the second respondent. They were similarly not charges levelled against the applicant. They are commonly known as show cause letters issued by the second respondent as employer upon receiving complaints about the applicant with a view to eliciting the applicant's response to those complaints. As seen above, the applicant had replied to both show cause letters and had provided her version/explanation.

[36] There was no dispute that matters seemed to have progressed rather slowly in the investigation into the complaints against the applicant. However, in my opinion, as submitted by the respondent, investigating disciplinary matters can take time and that in any event, there is no time limit prescribed in the disciplinary rules to institute and complete disciplinary proceedings. This does not however mean that an employer can prolongate a disciplinary matter taking no action indefinitely. In my view, disciplinary matters should progress timeously with all reasonable efforts taken to investigate and prosecute the same. On the facts of this case, bearing in mind the nature of the allegations and the chronology of events, I cannot conclude that there was any inordinate delay causing any prejudicial consequence to the applicant. She did remain, at all material times, in employment until the final determination of the charges against her. I am certainly also not prepared to conclude that there was any condonation by the respondent employer.

[37] Similarly, as for the payment of bonuses for the period 2018 to 2020, I do not see how this *per se* supports the argument that the matters complaint of were condoned. In my view, until a finding of misconduct is made, the employer is surely obliged to honour its contractual and other obligations *qua* employer and surely the employee may not be condemned before then.

The Transfer Order

[38] The applicant had sought to take issue with her transfer to the treasury department as directed by the employer's transfer letter dated 21 September 2018. A careful perusal of the said letter clearly discloses that it was a temporary transfer pending the investigation into the complaint against her but as noted, its effect continued up to and until her dismissal.

[39] in my view, I find nothing wrong or illegal about the transfer order. Quite apart from there being no evidence that the applicant had objected to the same at the material time, I note from the contents of the applicant's letter of offer dated 17 April 2013 that it was an express term therein that she may be directed to work in any department of the employer.

The Charges/Procedure/Natural Justice

[40] It is not disputed that the first respondent is vested with the requisite authority for disciplinary matters which included the authority to dismiss an employee of the second respondent. The relevant provisions therefor are to be found in regs. 32 to 35 of the Kaedah-Kaedah Pekerja (Kelakuan dan Tatatertib) Majlis Perbandaran Pulau Pinang 2000 which provides as follows:

32. An employee shall not be dismissed or reduced in rank in any disciplinary proceedings under this part unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard.

33. Except as provided for under Rule 40, where there is an alleged breach of discipline by an employee, the Chairman of the Disciplinary Board shall, before commencing any disciplinary proceedings in respect of the employee, consider whether the breach of discipline complained of is of a nature which merits a punishment of dismissal or reduction in rank or a punishment lesser than dismissal or reduction in rank.

34. (1) Where the Chairman of the Disciplinary Board finds that the breach of discipline complained of is of a nature which merits a punishment lesser than dismissal or reduction in rank, the Disciplinary Board shall inform the employee in writing of the facts of the breach of discipline alleged against him and shall give to the employee an opportunity of making a representation in writing within a period of not less than twenty-one days from the date of receipt of the facts.

(2) Where, after considering the representation, if any, made under sub rule (1), the Disciplinary Board finds:

(a) the employee guilty, it shall impose on the employee any one or more of the punishments specified in Rule 46 as it deems fit and proper; or

(b) the employee not guilty, it shall acquit him.

35. (1) Where the Chairman of the Disciplinary Board finds the breach of discipline complained of has been found to be of a nature which merits a punishment of dismissal or reduction in rank, the Disciplinary Board shall consider all the available information and, where it appears that there is a *prima facie* case against the employee for dismissal or reduction in rank, the Disciplinary Board shall direct that a statement containing the facts of the breach of discipline alleged to have been committed by the employee and any proposed ground on which the employee is to be dismissed or reduced in rank be sent to the employee and shall upon him to make a written representation, containing grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days from the date of receipt of the charge

(2) Where after considering the representation made pursuant to sub rule (1), the Disciplinary Board is of the opinion that the breach of discipline or misconduct by the employee does not merit the punishment of dismissal or reduction in rank, the Disciplinary Board may impose on the employee any lesser punishment as it deems fit and proper.

[41] It is not disputed that the applicant's dismissal was premised on the above regulations as both the charge letter and dismissal letter make express reference to reg. 35. It is also not disputed that the applicant was ultimately

dismissed for only those two charges despite there being several other allegations raised in the previous show cause letter. In this regard, whilst the respondent contends that the disciplinary process only commenced with the issuance of the charge letter dated 29 August 2019, in my view, it is still necessary to consider the full chronology of events and factual matrix from as early as the first show cause letter of 6 August 2018. By this letter of 6 August 2018, which was signed by the Setiausaha Bandaraya on behalf of the second respondent as employer, the applicant was informed that a complaint was received concerning her abuse of authority by requesting one Encik Akbar, who was the supervisor of the applicant's husband one Encik Rithaudeen, to come to her office to "mengesahkan dan menandatangani kad Perakam Waktu Electronic (PWE) kehadiran Encik Rithaudeen bagi tujuan membantunya mendapat bantuan Khas Kewangan Kedua (BKK-2)." The essence of the allegation was that the applicant was using her position to try and assist her husband to obtain the BKK-2 claim.

[42] In response to the said show cause letter, the applicant sent a lengthy reply dated 13 August 2018. In her reply, she stated that she had received many complaints from the staff about them not having received their bonuses in full. She stated that in the case of employees under the supervision of Encik Akbar, she had discovered that there was no "perakuan" and "pengesahan" of the attendance of his staff which had led to the complaints. She then contacted Encik Akbar to obtain clarification and to which the latter said he would see her in her office to discuss the matter which he subsequently did. Encik Akbar acknowledged that there were various issues such as the lack of computers and others and that he had acknowledged that his staff would not get the BKK-2 if their attendance not properly recorded. She then further stated that as part of the audit team, she had a duty to check complaints including those from staff in respect of which she may examine records and question individuals. She then concluded by saying that there was no abuse of power by her as in checking the records of employees, she did not single out any specific employee but had instead listed down the names and records of ten employees she had checked. She ended by stating that she was merely carrying out her duties as an auditor diligently and was not guilty of abusing her position or any wrongdoing.

[43] It is interesting to note that despite the contents of her reply and the making of various positive statements about the scope of her duties coupled with the narration of facts of what actually transpired, she received absolutely no response from the second respondent. However, the applicant did receive a letter dated 21 September 2018 which, however, makes no reference to the show cause letter or her reply but merely stated that she was being transferred to the treasury department, temporarily, to allow for an investigation into a complaint against her.

[44] Things went quiet for about three months. Rather than to reply to the matters raised by the applicant in her response to the first show cause letter, a second show cause letter was then issued by the same Setiausaha Bandaraya of the second respondent dated 4 December 2018. No mention was made of the earlier allegation in the first show cause letter relating to the issue of attendance and checking the PWE (Perakam Waktu Elektronik). Now however, the second show cause letter states that several complaints have been received about the applicant and they have been referred to the JPTAM for further investigation and that in their meetings, and upon taking evidence from several individuals, the applicant was asked to explain her conduct in respect of eight other allegations pertaining to will be used to verify the originality of this document *via* eFILING portal various issues. Of significance to this application was allegation number five in the second show cause letter in which it was alleged that the applicant had attended a courtesy call on the Honourable Chief Minister of Penang on the 9 October 2018 organised by Parti Amanah Negara (PAN) during which she tried to raise the issue of the investigation proceedings against her with the intention of securing external influence to support her.

[45] Again, in response to this second show cause letter, the applicant had sent a lengthy reply date 10 December 2018. In it, she questioned why there was a sudden spate of complaints against her after having served for 15 years with an unblemished record. She in fact alleged that she was being victimised as a result of her having questioned various expenditure of the Majlis. She nonetheless proceeded to give a detailed reply for each allegation against her. Specifically, on the allegation about her visit to the Chief Minister, she stated that it was a courtesy call in her capacity as a member of the Penang Bicycle Association and she categorically denied raising any specific issue or trying to secure any external influence as alleged.

[46] As with the case of the first show cause letter, there was again absolutely no response from the second respondent to the applicant's reply. This time, there appeared to be a silence for almost eight months. Whilst the applicant may arguably contend that the silence for this passage of time effectively meant that the applicant's explanation was accepted, for the reasons stated earlier, I am not prepared to conclude that this apparent inactivity of about eight months afforded the applicant a defence of condonation or that it effectively meant that her explanations were accepted.

[47] What happened next was the issuance of a letter dated 29 August 2019, but this time from the Chairman of the Disciplinary Authority *ie*, the first respondent. This letter expressly stated that it was being issued pursuant to reg. 35 which may lead to a dismissal or a downgrade in rank. As this letter contains the two charges for which the applicant was subsequently dismissed, it is apt that it is reproduced for its full terms and effect.

MAJLIS BANDARAYA PULAU PINANG
JABATAN KHIDMAT PENGURUSAN
PARAS 17, KOMTAR, JALAN PENANG, 10675 PULAU PINANG
Hotline : 04-263 7637 , 263 7000 Tel. : 04-269 3020 Fax : 04-262 6260 http://www.mbpp.gov.my

49

SULIT

Ruj. Kami: MBPP.JKP(S).500-2/14/389

Tarikh : 29 AUG 2019

PUAN ROSMAWATI BINTI ISMAIL
No. K/P: 810723-07-5378
Juruaudit Gred W41
Jabatan Perbendaharaan
Majlis Bandaraya Pulau Pinang

Melalui dan salinan :-

Setiausaha Bandaraya
Majlis Bandaraya Pulau Pinang

Puan,

Tindakan Tatatertib Dengan Tujuan Sampai Buang Kerja Atau Turun Pangkat Di Bawah Kaedah 35, Kaedah-Kaedah Pekerja (Kelakuan dan Tatatertib) Majlis Perbandaran Pulau Pinang 2000

Bahawa satu laporan telah diterima oleh Pihakberkuasa Tatatertib yang menyatakan bahawa puan, ROSMAWATI BINTI ISMAIL, Juruaudit Gred W41, telah berkelakuan yang melanggar tatakelakuan dan membolehkan tindakan tatatertib diambil terhadap puan.

2. Pihakberkuasa Tatatertib, setelah menimbang segala maklumat yang diterima, berpendapat bahawa puan patut dikenakan tindakan tatatertib dengan tujuan sampai buang kerja atau turun pangkat di bawah Kaedah 35, Kaedah-kaedah Pekerja (Kelakuan dan Tatatertib) Majlis Perbandaran Pulau Pinang 2000 atas pertuduhan berikut :-

Pertuduhan Pertama:

Bahawa puan, ROSMAWATI BINTI ISMAIL semasa bertugas di Unit Audit Dalam sebagai Ketua Audit Dalam telah bertindak mengarah Encik Akbar bin Kamarudin, Pembantu Kesihatan Awam Gred U19 selaku penyelia kepada Encik Mohd Rithaudden bin Mohd Ramli, Pembantu Awam Gred H11 iaitu suami kepada puan supaya datang ke bilik puan pada 13.12.2017 sekitar jam 1.00 tengahari bagi mengisi maklumat ketidakhadiran dan mengesahkan serta menandatangani rekod kehadiran Perakam Waktu Elektronik (PWE) suami puan dengan niat bagi membolehkan beliau layak menerima Bantuan Khas Kewangan Kedua (BKK-2) Tahun 2017.

.../2.

SULIT

-2:-

Berdasarkan fakta di atas puan telah melanggar Kaedah-kaedah Pekerja (Kelakuan dan Tatatertib) Majlis Perbandaran Pulau Pinang 2000 di bawah tatakelakuan berikut:- 50

Kaedah 10(2) Seseorang pekerja tidak boleh–

(a) Membelakangkan tugas awamnya demi kepentingan persendiannya.

Jika puan didapati bersalah ke atas pertuduhan tersebut, puan boleh dihukum mengikut Kaedah 46, Kaedah-kaedah Pekerja (Kelakuan dan Tatatertib) Majlis Perbandaran Pulau Pinang 2000.

Pertuduhan Kedua:

Bahawa puan, ROSMAWATI BINTI ISMAIL semasa bertugas di Unit Audit Dalam sebagai Ketua Audit Dalam telah menghadiri suatu perbincangan sewaktu kunjungan hormat ke atas YAB Ketua Menteri anjuran Parti Amanah Negara (PAN) pada 9.10.2016 jam sekitar 2.15 petang bertempat di Bilik Sidang Akhbar, Pejabat Ketua Menteri, Tingkat 28, KOMTAR. Sewaktu perbincangan tersebut, Tuan Haji Mohamed Yusoff bin Mohamed Noor selaku Ketua PAN kawasan Tanjung telah membangkitkan mengenai proses siasatan yang sedang dijalankan ke atas puan dengan niat bagi mendapatkan sokongan serta simpati YAB Ketua Menteri. Tindakan ini jelas memperlihatkan bahawa puan telah cuba menggunakan pengaruh luar bagi tujuan menyokong kepentingan peribadi puan.

Berdasarkan fakta di atas puan telah melanggar Kaedah-kaedah Pekerja (Kelakuan dan Tatatertib) Majlis Perbandaran Pulau Pinang 2000 di bawah tatakelakuan berikut:-

Kaedah 10(2) Seseorang pekerja tidak boleh–

(h) membawa atau cuba membawa apa-apa bentuk pengaruh atau tekanan luar untuk menyokong atau memajukan tuntutan berhubungan dengan perkhidmatan sebagai pekerja Majlis, sama ada tuntutan itu adalah tuntutannya sendiri atau tuntutan pekerja-pekerja lain.

Jika puan didapati bersalah ke atas pertuduhan tersebut, puan boleh dihukum mengikut Kaedah 46, Kaedah-kaedah Pekerja (Kelakuan dan Tatatertib) Majlis Perbandaran Pulau Pinang 2000.

3. Mengikut Kaedah 35, Kaedah-Kaedah Pekerja (Kelakuan dan Tatatertib) Majlis Perbandaran Pulau Pinang 2000, puan adalah diminta membuat satu representasi secara bertulis yang mengandungi alasan-alasan yang puan hendak gunakan untuk membebaskan diri puan. Representasi tersebut hendaklah dikemukakan kepada Pengerusi Pihakberkuasa Tatatertib, Majlis Bandaraya Pulau Pinang, melalui Setiausaha Bandaraya dalam tempoh 21 hari daripada tarikh puan menerima surat ini. Sekiranya puan tidak membuat representasi tersebut dalam tempoh masa yang ditetapkan itu, puan akan dianggap sebagai tidak hendak membela diri dan perkara ini akan terus diputuskan oleh Pihakberkuasa Tatatertib, Majlis Bandaraya Pulau Pinang, berdasarkan keterangan-keterangan yang sedia ada sahaja.

SULIT

-3:-

4. Sila puan akui penerimaan surat ini dengan menandatangani surat akuan terima yang disertakan dan kembalikan. 51

Sekian, terima kasih.

"KECEMERLANGAN BUDAYA KITA"

Saya yang menjalankan amanah,

(DATO' Ar. YEW TUNG SEANG)
Pengerusi
Pihakberkuasa Tatatertib
Majlis Bandaraya Pulau Pinang

[48] It will immediately become apparent that the allegation in the first show cause letter as well as only one of the eight allegations in the second show cause letter were presented as charges against the appellant by the first respondent. The necessary conclusion from this must be that the applicant's explanation in respect of all the other allegations must have been found satisfactory and/or the other allegations did not warrant being pursued.

[49] As requested, the applicant yet again provided her reply to this said charge letter by her letter dated 30 September 2019. This was effectively her written representation with her grounds to exculpate herself of the two charges. Again, I think it is important to set out the said response *verbatim.*

53

Pengerusi
Pihakberkuasa Tatatertib
Majlis Bandaraya Pulau Pinang

Melalui :

Setiausaha Bandaraya
Majlis Bandaraya Pulau Pinang

SURAT TUNJUK SEBAB

Dengan segala hormatnya saya ingin menarik perhatian Dato' berhubung perkara di atas dan surat bertarikh 29 Ogos 2019 yang saya terima pada 11 Sept 2019.

Pertuduhan Pertama

Merujuk kepada surat tuan yang menyatakan terdapat aduan ke atas saya, perkara ini telah dibangkitkan dan diberi penjelasan secara lisan kepada Dato' juga bertulis kepada Dato' dan Setiausaha Bandaraya serta pihak urusetia Mesyuarat Bersama Jabatan. Malah perkara ini telah diselesaikan didalam Mesyuarat Bersama Jabatan. Namun perkara ini dibangkitkan semula seperti ada komplot yang sengaja untuk menjatuhkan saya.

Dari awal perkara ini dibangkitkan dalam Mesyuarat Bersama Jabatan, penjelasan telah beberapa kali saya beri namun sengaja tidak diminitkan oleh urusetia mesyuarat yang sepatutnya mencatat setiap perkara yang dibincangkan.

Saya menafikan sekeras-kerasnya pertuduhan yang dibuat ke atas saya malah pertuduhan tersebut tidak berasas. Apakah bukti pertuduhan tersebut?

2. Apa tujuan aduan sebenarnya yang menyembunyikan kebenaran semakan dibuat untuk ramai kakitangan dengan hanya menyalakan semakan bonus dibuat ke atas seorang individu (suami saya sahaja).

Walau sekalipun semakan melibatkan seseorang individu, adakah tindakan itu dianggap menggunakan kedudukan saya. Jika begitu antara semakan ke atas aduan yang telah saya jalankan bagi kes kakitangan berikut:

- En Mohd Hassan Bin Hashim
  Hanya selepas semakan dibuat oleh pihak Audit, beliau mendapat bayaran Ex-Graxia. Bertahun-tahun terlantar, kebajikan tidak diberikan perhatian. Bersyukur sempat membantu arwah mendapatkan bayaran Ex-Graxia sebelum menghembuskan nafas terakhir beliau.

- Encik Khairi Bin Hashim
  Kes Penyemakan Semula Hadlah Kenaikan Gaji Bekas Anggota Tentera Yang Dilantik Ke Jawatan Pemandu Kenderaan yang akhirnya selepas semakan pihak audit beliau beroleh tambahan 2 matagaji.

Adakah semua semakan ke atas aduan ini menyalahi tanggungjawab saya sebagai seorang jurusudit. Saya menjalankan tugas mengikut *Akta Audit 1957* dan *Piawaian Antarabangsa Amalan Profesional Audit Dalaman (International Standards for the Professional Practice of Internal Auditing)*. Pihak Audit bertanggungjawab membuat semakan ke atas setiap aduan

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yang diterima daripada mana-mana pihak termasuk pihak pekerja atau pengurusan. 54
Semakan boleh dibuat dengan pelbagai kaedah termasuk menyemak rekod, dokumen atau menyoal siasat individu terlibat atau mana-mana individu yang berkaitan dengan audition tersebut. Malah sepanjang tugasan saya sebagai juruaudit sentiasa ada kakitangan, pegawai penyelia dan ketua jabatan yang hadir ke pejabat untuk sesi perbincangan, temubual atau soal siasat.

B

3. Adakah menjadi kesalahan memaklumkan apa tindakan yang sepatutnya dibuat oleh pegawai yang telah tidak menjalankan tanggungjawab yang sewajarnya.

Pegawai Jabatan Perkhidmatan Perbandaran sendiri tidak melaksanakan tanggungjawab memastikan pelaksanakan penggunaan penuh Sistem Time Attendance - Thumb Print sehingga menyebabkan kakitangan yang layak dibayar bonus penuh tidak mendapat bayaran apabila Kerajaan Negeri mengumumkan bayaran bonus penuh pada tahun tersebut adalah berdasarkan rekod sistem kehadiran di agensi masing-masing. Kesalahan yang sepatutnya ditanggung oleh pegawai terlibat dibebankan kepada kakitangan yang tidak bersalah. Malah selepas semakan dibuat juga, tiada bayaran dibuat kepada kakitangan-

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kakitangan yang menjadi mangsa pegawai yang tidak bertanggungjawab ini.

4. Sebaliknya tanggungjawab yang saya laksanakan bagi memastikan keadilan ke atas kakitangan yang tidak bersalah ini dijadikan alasan demi memuaskan kehendak individu-individu tertentu untuk menghukum saya. Mohd Ritheudden merupakan kakitangan pada masa tersebut dan mempunyai hak sama rata seperti kakitangan lain. Semakan dibuat bagi kes BKK ini melibatkan banyak kakitangan lain antara yang masih saya ingat :

D

- En Mohd Azruddin Bin Abidin
- En Shahril Bin Johari
- En Mohammad Fikri Bin Fadzil
- En Nirmal a/l Kunasegaran
- En Mohd Firdaus Bin Haja Mydin
- En Saidina Umar Bin Mansor
- En Mohd Ibrahim Khalil Ali Banjunid Bin Omar
- En Nooralem Bin Mohamad Yusoff
- En Muhammad Hafiz Bin Jamaluddin (Bukti wasap dikemukakan sebelum ini)

E

- En Mohd Ritheudden Bin Mohd Ramli

5. Tiada sebarang halangan untuk juruaudit membuat semakan melibatkan individu dikenalinya atau ahli keluarga selagi individu tersebut merupakan kakitangan di agensi yang berkenaan kerana tataetika juruaudit berlandaskan prinsip yang mana Juruaudit Dalaman dikehendaki menggunakan dan mendukung prinsip berikut iaitu " Integriti " Integriti Juruaudit Dalaman membentuk kepercayaan yang menjadi asas bagi kebergantungan terhadap pertimbangan mereka.

F

Saya tahu dan sedar tanggungjawab saya sebagai seorang juruaudit dan sentiasa memegang tinggi etika kerja sebagai seorang juruaudit Setelah hampir 15 tahun saya berkhidmat di Majlis mengapa baru sekarang kelihatan banyak aduan mula dibuat ke atas saya. Adakah kerana sejak kebelakangan ini saya mula mempersoalkan perbelanjaan-perbelanjaan yang melibatkan wang Majlis. Sebagai seorang juruaudit saya bertanggungjawab untuk memastikan wang rakyat dibelanjakan secara teratur mengikut prosedur ditetapkan disamping tidak berlaku sebarang kelemahan, penipuan dan penyelewengan yang menjejaskan kecekapan dan keberkesanan Majlis dalam memberi perkhidmatan kepada rakyat.

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Dato' Setiausaha Bandaraya, saya minta satu sesi angkat sumpah (Al-Quran) bersama-sama pengadu En Akbar Bin Kamarudin dapat dijalankan. Harap Datuk Bandar dan Dato' SU akan berlaku adil. 55

Pertuduhan Kedua

B

Saya menafikan sekeras-kerasnya pertuduhan dan tomahan yang dibuat ke atas saya malah pertuduhan tersebut tidak berasas.

2. Pada 9 Okt 2018 saya tidak bertugas di Unit Audit Dalam. Pada tarikh tersebut saya bertugas di Jabatan Perbendaharaan. Kunjungan tersebut adalah sekadar kunjungan hormat ke atas YAB Ketua Menteri. Tanpa prejudis. Kunjungan oleh Persatuan Basikal Bukit Pulau Pinang dan Amanah Tanjung digabungkan oleh pejabat YAB Ketua Menteri. Kehadiran saya atas kapasiti sebagai Ahli Persatuan Basikal Bukit Pulau Pinang.

C

Tiada spesifik isu dibangkitkan. Tuan Haji Mohamed Yusoff b. Mohamed Noor sebagai pemimpin masyarakat membawa pelbagai isu untuk dibincangkan. Beliau mengutarakan pelbagai isu secara menyeluruh tanpa specifik nama dinyatakan. Dan mengapa kesalahan perlu diletakkan dibahu saya atas perkara yang dibangkitkan oleh Tuan Haji Mohamed Yusoff b. Mohamed Nor. Sebagai pemimpin masyarakat beliau berhak membawa apa saja isu kepada YAB Ketua Menteri dan sebagai YAB Ketua Menteri beliau layak mendengar luahan rakyat.

D

Tiada sebarang laporan dikemukakan oleh Ketua Parti Amanah atau pun pengerusi Persatuan Basikal Bukit Pulau Pinang menunjukkan isu proses siasatan ke atas saya menjadi perkara penting yang dibincangkan semasa kunjungan tersebut. Malah sebagai rakyat sesiapa saja berhak bertemu YAB Ketua Menteri.

Dikemukakan untuk perhatian tuan sewajarnya.

Sekian, terima kasih.

E

"KECEMERLANGAN BUDAYA KITA"

(ROSMAWATI BINTI ISMAIL)

F

s.k. Penolong Pengarah Kanan (Perkhidmatan)

Bertarikh: 30 Sept 2019

G

H

I

[50] There can be no doubt from the above that the applicant had vehemently denied the two charges and had in fact asked – "Apakah bukti pertuduhan tersebut?" She, in her letter, reiterated the contents of her reply to the first show cause letter in relation to charge one *ie*, that her checking of attendance records was in relation to ten staff which included her husband and that there was nothing to prohibit the same as long as principles of integrity were adhered to.

[51] In relation to the second charge, it will be apparent that there was a difference/variation from the earlier allegation as per the second show cause letter which had initially alleged that the applicant had raised the issue of her case with the Chief Minister. In the charge sheet however, it was now stated that one Tuan Haji Mohd Yusof as head of Parti Amanah Negara (PAN) had raised the issue to extract support and sympathy from the Chief Minister for the applicant. As can be seen above, her reply to the charge was that whilst Tuan Haji Yusof was at the meeting, no specific matter was raised save for various general matters. In fact, she queried why she should be punished for anything that Tuan Haji Yusof may have said. In passing, I have noted that the applicant's explanations/defences to the allegations/charges against her in denying culpability have been consistent throughout.

[52] Despite her response dated 30 September 2019, there again appeared to be inactivity for almost ten months. The applicant then received a letter dated 9 July 2020 signed by the Chairman of the first respondent informing her that the first respondent had met on the first July 2020 and after considering her representation, were satisfied that the punishment to be meted was that of a dismissal order under reg. 46(1)(g).

[53] In the dismissal letter dated 9 July 2020, I note that there was neither any mention of any specific finding of guilt in respect of either or both charges proffered against the applicant nor were there any reasons given as to why her explanations were not accepted. Similarly, whilst r. 46(1) provides various forms of punishments including fines, warning, reduction in salary or rank, *etc*, no reason was given as to why a dismissal order was warranted.

[54] This then leads me to discuss the crux of the applicant's complaint in this matter and that was that the alleged misconducts have not been proven and further that the respondents have failed to provide reasons for the applicant's dismissal. As seen earlier, in the dismissal letter, the respondent did not provide any reason for the dismissal. In the respondent's affidavit affirmed by the Chairman of the first respondent the following was averred at paras. 29.2 and 33.11:

> 29.2 Responden Pertama dalam mesyuarat yang diadakan pada 1.7.2020 yang dipengerusikan oleh saya sendiri, telah mempertimbangkan representasi Pemohon bertarikh 30 September 2019 (Ekshibit R-13) dengan teliti dan berpuas hati bahawa Pemohon melalui representasi bertulis beliau tidak dapat membebaskan diri daripada pertuduhan Responden Pertama sehingga memuaskan hati Responden Pertama. Responden Pertama dalam mesyuarat yang sama telah memutuskan Pemohon dikenakan tindakan tatatertib dengan hukuman buang kerja yang berkuat kuasa serta-merta.
>
> ...
>
> 33.11 Responden Pertama telah mempertimbangkan representasi Pemohon dengan teliti dan berpuas hati bahawa Pemohon melalui representasi bertulis, beliau tidak dapat membebaskan diri daripada pertuduhan Responden Pertama sehingga memuaskan hati Responden Pertama.

It is also then further averred at para. 33.13 as follows:

> 33.13 Responden Pertama berpendapat bahawa kes terhadap Pemohon tidak mengkehendaki penjelasan lanjut. Sehubungan itu, tiada keperluan untuk penubuhan suatu Jawatankuasa Penyiasatan bagi maksud mendapatkan penjelasan lanjut sedemikian.

[55] Therefore, apart from the above averments, as it stands, there was absolutely nothing before the court that can in any manner substantiate the charges against the applicant. When this was posed to learned counsel for the respondents during the hearing, his reply was merely that the evidence of guilt was that the first respondent found the written representation not exculpatory.

[56] In my view, the respondent had clearly failed to give any reasons why they had concluded that the applicant had failed to exculpate herself. Was it sufficient for the respondent to merely state that they found the applicant's representation not to be exculpatory? I think not. I find support for my view from the following pronouncements by the Court of Appeal in *Nazrul Imran Mohd Nor v. Civil Service Commission Malaysia & Anor* (*supra*) which facts were very similar. In relation to the issue of the need to provide reasons, this is what was held by Abu Bakar Jais JCA:

> [58] The Chairman of the first respondent swore an affidavit to contest the appellant's application for judicial review. She affirmed that she chaired the meeting that decided the appellant should be dismissed from service. In her affidavit, she also affirmed that the appellant had sent a representation to explain his action in respect of his statement in the Facebook. She affirmed that after considering the said representation, it was found that the appellant had failed to exculpate himself. However, she herself had failed to explain in the affidavit why she considered that the appellant had failed in doing so. She gave no reasons in her affidavit why she found that the appellant had failed to exculpate himself.

[59] In her affidavit, she did not say why the first respondent rejected the appellant's claim that he had meant to console the Prime Minister for the loss of his friend. This may be not acceptable to the first respondent but all the same, reasons must be given why this was rejected by the first respondent. The reasons given by the appellant why he had posted his statement in the Facebook, might be weak and lacking in substance, however, the first respondent must still address its mind as to why the reasons given were not considered sufficient to exculpate the appellant. Especially so when it was thought fit to dismiss the appellant from service. Dismissal being a very harsh punishment, at the very least the first respondent should have given reasons why the appellant's representation was not acceptable.

[60] It is not sufficient for her to merely state that she carefully had considered the appellant's representation. It is also insufficient for her to merely say that the appellant's representation did not exculpate him from the charge. These statements were bereft of substance as there were no reasons given why there was no merit to the appellant's representation.

[61] Likewise, in her affidavit she did not explain why the first respondent could not accept the representation of the appellant that his statement in the Facebook did not tarnish the image of the Malaysian Government. Since the appellant asserted in his representation that his Facebook posting did not tarnish the name of the Malaysian Government, the respondent must rebut this assertion with reasons. This must be done to justify the dismissal of the appellant. Unfortunately, there were no reasons provided by the respondents. In fact, in her affidavit, she had acknowledged that the appellant had explained the reasons for his action.

[62] Similarly, the appellant had stated in his representation that his comments in the Facebook had been misinterpreted and had been distorted to his detriment. However, there is no explanation or reason given by the first respondent why this was not an acceptable explanation. The first respondent failed to give any reason why this explanation by the appellant was not accepted or countenanced.

[63] In fact, there is a letter from the first respondent to the appellant dated 14 February 2017 stating that the appellant had been asked to submit a representation. In this letter, the first respondent acknowledged that the representation had been sent and the appellant was informed that he had been dismissed from service. The letter did not at all explain the reasons why the first respondent had rejected the defences raised in the representation.

[64] An affidavit was also filed by the Head of Department of the appellant. He affirmed the affidavit on behalf of the PSC and the second respondent. Most of what he affirmed to in his affidavit were a repetition of the affidavit of the Chairman of the first respondent. Similarly, in his affidavit, there were no reasons stated as to why the appellant's representation in answering the charge was not accepted.

[65] It is incumbent on both respondents not to merely say the appellant did not exculpate himself in respect of the charge against him by the representation he had sent These statements made that are without any basis given, no matter how strenuously made, remain devoid of any substance or weight. Both respondents, especially first respondent, are duty bound to explain and given reasons for rejecting the grounds given by the appellant in his representation in answering the charge. Unfortunately, this was not done by the respondents as is evident from the affidavits filed.

[66] Further, the failure of the first respondent to explain why the appellant was found not able to exculpate himself, also gives credence to the contention that the first respondent did not sufficiently consider the appellant's defences. If indeed the first respondent had taken into account the appellant's defences and had rationally considered the same, surely reasons could be provided for rejecting the appellant's defences.

[57] The above is largely premised on the basis that there is a duty cast on public authorities to provide reasons for their decisions, even if no express stipulation of such a requirement exists to do so. The duty to provide reasons is not grounded only for reason of fairness but is also makes for good administration. Again, I can do no better than to echo the following observations by Mary Lim JCA (as Her Ladyship then was) in the case of *Perbadanan Pengurusan Trellises & Ors v. Datuk Bandar Kuala Lumpur & Ors* [2021] 2 CLJ 808; [2021] 3 MLJ 1 where Her Ladyship held as follows:

[112] Then, there is the matter of duty to give reasons. We would have thought that the law on this issue is fairly clear and settled from the early years of *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487 where it was ruled that a reasoned decision can be an additional constituent of the concept of fairness' and where the reasons have to be given so that the right of appeal may be properly and meaningfully exercised; to *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 ('MPPP') where the Federal Court extensively reasoned on why there must be this duty to give reasons even if there is no express provision for such duty. According to the Federal Court, this duty to give reasons emanates from the concept of fairness; see also *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590; [2017] 4 CLJ 265 and *Mohamad Hassan bin Zakaria v. Universiti Teknologi Malaysia* [2017] 6 MLJ 586; [2017] 10 CLJ 36 (see discussions of the same in *Save Britain's Heritage v. Secretary Of State For The Environment And Others* [1991] 2 All ER 10).

[113] The absence of an express provision in any statute requiring the decision-maker to give reasons does not mean that the duty does not exist unless and until the statute specifically states so. Even then, the case law has developed progressively to instil an innate will on public authorities to explain their decisions. The Federal Court in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd* categorically held that 'The

absence of such a provision ought not to be regarded as a cloak under which the decision maker can hide his rationale for making the decision, privy only to himself but a mystery to the interested parties or the public at large'.

[117] Giving reasons without being compelled, is not just grounded in fairness but, as expressed by the Supreme Court in *Mandalia v. Secretary of State for the Home Department* citing Laws LJ in *R (on the application of Nadarajah) v. Secretary of State for the Home Department R (on the application of Abdi) v. Secretary of State for the Home Department* [2005] All ER (D) 283; [2005] EWCA Civ 1363 (Nov) 'a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public'. This results in better decision-making, or better-informed decision-making and it reflects the 'democratic principle at the heart of our society' as expressed in *R (on the application of Moseley) v. Haringey London Borough Council* [2015] 1 All ER 495.

[118] Similar views were expressed by the Federal Court in MPPP. After discussing amongst others, *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* where it was ruled that 'a reasoned decision can be an additional constituent of the concept of fairness'; and agreeing with the Privy Council decision in *Stefan v. General Medical Council* [1999] 1 WLR 1293 that despite the absence of express statutory obligation to state reasons and neither could it be implied such an obligation, the Privy Council found that there was power to give reasons, as: ... giving reasons can be beneficial and assist justice: (1) in a complex case to enable the doctor to understand the Committee's reasons for finding against him; (2) where guidance can usefully be provided to the profession, especially in difficult fields of practice such as the treatment of drug addicts; and (3) because a reasoned finding can improve and strengthen the appeal process. The Federal Court proceeded to hold at p. 64:

> We endorse the principles enunciated by the Privy Council in Dr Stefan and say that in the exceptional circumstances of this case and having regard to the trend towards increased openness in matters of Government and administration, as a matter of fairness, reasons should have been given by the Council as to why it was imposing the disputed condition and thus resiling from the original approval of planning permission which was free from any pricing condition ...

[119] In *Pembinaan Batu Jaya Sdn Bhd v. Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 495; [2016] 5 MLRA 503, Abang Iskandar JCA (now CJ (Sabah and Sarawak)) when dealing with the issue of duty to give reasons in the context of revocation of alienation of land expressed the following view:

> [45] ... the principle as stipulated in the *Sri Lempah Enterprise* case is applicable in cases involving exercise of discretion, absolute or otherwise. High authorities have shown such phrase to be a gross anomaly that cannot pretend to even co-exist (see for instance: *Pyx*

> *Granite Co Ltd v. Ministry of Housing and Local Government* [1958] 1 All ER 625). In exercise of a public power, there is no escaping the obligation on the part of the decision-maker to act reasonably in the peculiar circumstances of the case that appears before him. One of the fundamental features in modern administrative law jurisprudence has been the growing need for the public decision-maker to give reasons for his decision. It may be inconvenient to do so. But it is an indivisible component in all decision-making processes. We find that every decision, both good and bad, is driven to such conclusion by a reason. Learned Justice Zainun AH JCA (as she then was) in the case of *Datuk Justin Jinggut v. Pendaftar Pertubuhan* [2012] 3 MLJ 212 had said this: Thus, if no reason is given by the respondent, it is open for this court to conclude that he had no good reason in as much as it is open for us to conclude that the respondent had not exercised his discretion in accordance with the law.

[120] His Lordship further added:

> ... we could not find any statute which contains express provisions that affirmatively prohibit a public officer, as a decision-maker, in the discharge of his public duty, from assigning any reason for his decision. Indeed, it would be most strange, if there as one such statute. We say so because it would defeat the essence of good governance and that it would not promote accountability and owning up to responsibility in decision-making. As such, the silence in a statute requiring that a reason or reasons be given by the decision-maker ought not to be taken to mean there was therefore no duty to give reasons. The silence in the statute, on the duty to give reason fora decision, ought not to be made a cloak or a blanket under which the decision-maker could conveniently find refuge so that the rationale for his decision remains shrouded in mystery, privy only to himself, but not to the public at large, on whose behalf, he is entrusted to discharge that duty. That scenario would indeed be a contradiction in terms.

[58] The above decision was also cited with approval by the Court of Appeal in *Nazrul*'s case where, after it was concluded that there is clearly the need to provide reasons for the decision to dismiss, it was held that the decision to dismiss Nazrul could not stand as the respondents there had failed to do so.

[59] I would assimilate my views with those set out in the above authorities and am of the opinion that there is indeed a duty to provide reasons for a dismissal. This, in my view, is especially so when one considers that the applicant had suffered losses as a result of her dismissal and which had affected her livelihood.

[60] Applying the above principles enunciated by the Court of Appeal which are binding on me to the facts of this case, in my considered view, I am compelled to conclude that the decision to dismiss in this case cannot stand due the failure to provide any reason for the dismissal of the applicant. In my further view, the order for dismissal also cannot stand due to the absence of any evidence of the alleged misconduct rendering the decision irrational as being without any basis. In my opinion, it was certainly insufficient to state in the affidavits without more that the representation was found not to be exculpatory. As in *Nazrul*'s case, I find such statements to be bereft of substance as no reasons given as to why there was no merit in the applicant's representation.

[61] Nevertheless, it is perhaps necessary to then also look at the two charges that were levelled against the applicant. Charge one contends that the applicant was in breach of reg. 10(2)(a) of the Regulations *ie*, to "subordinate his duty as an employee of the council to his private interests". As can be gleaned from the applicants' numerous replies in her letters, she consistently took the position that she was merely carrying out her duties and that she was doing such checks with regards to complaints from many employees on the non-payment of their bonuses due to the failure of their supervisor to verify their attendance records and it so happened that her husband was one of those ten employees records that were checked. There is no dispute that despite such checking, the applicant's husband did not receive the BKK-2 bonus.

[62] The respondents have in their affidavit averred that it was not within the applicant's scope of duties to conduct any investigation and in order to conduct any investigation, the approval of the applicant's superiors had first to be obtained. First and foremost, if the respondent employer did not agree with her contention that she did have such a duty as set out in her responses to the two show cause letters, why didn't they respond to deny her contention? In any event, the applicant's job scope was annexed as exh. R-5 and a perusal of the same will reveal that she has rather wide powers of investigation into complaints, *etc*. Furthermore, the respondent had also failed to provide any evidence or basis for their contention that the applicant required the approval of her superiors before commencing any investigation.

[63] In so far as charge two is concerned, it is alleged that she breached reg. 10(2)(h) in that she sought to "bring or attempt to bring any form of outside influence or pressure to support or advance a claim relating to the service of the employee of the council ...". Firstly, there was simply no evidence led to support this allegation. There was no statement by the said Tuan Hj Mohamad Yusoff or anyone else for that matter to support this charge even on a *prima facie* level. It is apparent that if at all, it was one Tuan Hj Mohd Yusoff who may have raised the matter at this meeting with the Chief Minister and not the applicant. To this, there was also no evidence that

there was any collusion between the said Tuan Hj Mohd Yusoff and the applicant for this issue to be raised. The applicant denied that she had raised anything pertaining to her case at the courtesy call. Interestingly, when it came to the contents of the affidavits filed herein, the Chairman of the first respondent averred at para 28.6(ii) of his affidavit as follows:

> 28.6(ii) Semasa bertugas di Unit Audit Dalam sebagai Ketua Audit Dalam telah menghadiri suatu perbincangan sewaktu kunjungan hormat ke atas YAB Ketua Menteri anjuran Parti Amanah Negara (PAN) pada 9 Oktober 2018 jam sekitar2.15 petang bertempat di Bilik Sidang Akhbar, Pejabat Ketua Menteri, Tingkat 28, KOMTAR.
>
> Sewaktu perbincangan tersebut, Tuan Haji Mohamed Yusoff bin Mohamed Noor selaku Ketua PAN Kawasan Tanjung telah membangkitkan mengenai proses siasatan yang sedang dijalankan oleh Majlis Bandaraya Pulau Pinang ke atas Puan Rosmawati binti Ismail dengan niat bagi mendapatkan sokongan serta simpati YAB Ketua Menteri. Ini telah diakui oleh YB Teh Lai Heng (ADUN KOMTAR) sewaktu pertemuan bersama beliau pada 15 Mac 2019. Tindakan ini jelas memperlihatkan bahawa Puan Rosmawati binti Ismail telah cuba menggunakan pengaruh luar bagi tujuan menyokong kepentingan peribadinya dan telah melanggar Kaedah-Kaedah Pekerja MPPP 2000.
>
> Melanggar tatakelakuan dalam Kaedah-Kaedah Pekerja MPPP 2000 dan boleh dikenakan tindakan tatatertib selaras dengan Kaedah-Kaedah tersebut dan mempertimbangkan sama ada terdapat suatu kes '*prime facie*' terhadap Pemohon untuk dibuang kerja atau diturun pangkat.

[64] Again, there was no evidence whatsoever before the court, and I am in the dark about the connection with the said the Teh Lai Heng. It does however appear that the respondent had gone so far as to interview people without the knowledge or presence of the applicant. Furthermore, although they had obtained such information on the 15 March 2019, no mention is made of him in the charge letter that was issued on the 29 August 2019. In any event, in my considered view, even if Tuan Hj Mohd Yusof had raised the matter of the ongoing investigation on the applicant at such meeting, how can it be ascertained that the intention of doing so was to obtain any influence. In my view, there is merit in the applicant's contention that she certainly should not be penalised for any alleged utterance by someone else.

[65] In my considered view, on the facts of this case, and in light of the nature of the charges and the response by the applicant in her written representations, this was certainly a case that required further clarification and the disciplinary board ought to have appointed a committee of investigation pursuant to reg. 35(4) to allow her to appear personally and the opportunity to exculpate herself. As highlighted earlier, the respondents had in their possession what they say were various complaints and documents and had interviewed witnesses. None of these were provided to the applicant. If a committee of investigation were to have been appointed, then pursuant

A to regs. 35(6), (7) and (8), the applicant would have had the chance to examine the witnesses and be supplied with all necessary documents that were used against her. On this issue of documents used against the applicant, I have noted that the chairman of the first respondent had averred at para 28.4 of his affidavit in encl. 9 as follows:

B

> Selanjutnya, pada 23 Julai 2019, Setiausaha Responden Pertama telah mengemukakan kepada Pengerusi Responden Pertama suatu Kertas Kerja yang memaklumkan berkaitan aduan pelanggaran tatatertib oleh Pemohon tersebut dan dipinta mempertimbangkan di bawah Kaedah 33 Kaedah-Kaedah Pekerja MPPP sama ada pelanggaran tatatertib pegawai yang berkenaan adalah dari jenis yang patut dikenakan suatu hukuman buang kerja atau turun pangkat, atau suatu hukuman yang lebih ringan dari buang kerja atau turun pangkat.

C

[66] However, the working paper or "kertas kerja" was never provided to the applicant and neither was it produced in court. In the case of *Mohd Sobri Che Hassan v. Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor* [2018] 2 CLJ 715 the Court of Appeal quashed a dismissal by the Majlis Perbandaran on the basis that the proceedings that led to the dismissal was tainted with procedural unfairness and impropriety as the disciplinary authority there had considered a working paper that contained material that was detrimental to the applicant without providing the employee the same and thus the opportunity to be heard on it.

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[67] The respondent in this case contended that the applicant had not requested for any documents nor did she request an oral hearing and as such, based on decided cases, they were not obliged to do either. With respect, in my opinion, whilst the applicant may not have requested for either in those express terms in her representation, she had in no uncertain terms pleaded her innocence to the charges and had challenged the respondent to provide evidence of her guilt when she stated "apakah bukti pertuduhan tersebut?".

F

[68] I am mindful that in the above decision of the Court of Appeal in *Mohd Sobri Che Hassan* although it had quashed the dismissal order on the basis of the employee there was not provided the working paper, it had also held that the matter of the appointment of a committee of investigation is at the discretion of the disciplinary authority. However, in my view and opinion, the rationality or otherwise of the exercise of that discretion can be reviewed by the court in judicial review proceedings depending on the facts of each case. In particular, if the peculiar facts of a case reveal that the decision not to appoint such a committee was arrived at in the face of procedural unfairness, impropriety or was irrational, then the reviewing court should be allowed to intervene.

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I

[69] In the final analysis, as discussed earlier in this judgment, on the basis that no reasons were provided as well as a total lack of evidence on the two charges, I find that the respondent's decision to dismiss the applicant was irrational and cannot stand. In my view, the first respondent had failed to sufficiently consider the applicant's defences. If it had, it would certainly be able to provide reasons for saying they were not exculpatory. Such failure to give reasons for rejecting the applicant's representation and thereby dismissing her from service rendered such decision invalid.

[70] Furthermore, after having considered the nature and details of the charges levelled against the applicant and in particular, the lack of any evidence of the alleged misconduct, I find that the decision not to appoint a committee of investigation irrational. The charges and the contents of the written representation in my view certainly warranted the appointment of such a committee that would have afforded the applicant an opportunity to view all documents/evidence and to question the witnesses and her accusers. For this reason, 1 also find that there has indeed been a breach of natural justice and procedural impropriety on the part of the respondents.

[71] As such, I would also conclude that the decision to dismiss was irrational and that any other tribunal similarly circumstanced would not have arrived at a decision to dismiss the applicant.

[72] In the case of *R Rama Chandran v. Industrial Court of Malaysia* (*supra*), the Federal Court explained what irrationality meant as follows:

> By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1984] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' b now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.

[73] However, for completeness, 1 will also briefly deal with the issue of mitigation and proportionality of the punishment of dismissal meted out as submitted upon by both parties. There is no dispute that the applicant had been in the employ of the second respondent for 16 years with an unblemished record. She was clearly not given the opportunity to mitigate prior to her being issued the dismissal order. It is contended by the applicant that such mitigation, if allowed, could have led to one of the many other less severe punishments provided in reg. 46, *ie*, warning, fine, reduction in salary or rank, *etc*. In the case of *Nazrul Imran* (*supra*), the Court of Appeal had the occasion to make the following observation on this issue on the right to mitigate where it held as follow:

A [87] in addition, the right to mitigate before sentencing is a right well established. The right to mitigate is now trite and fundamental as it has been accepted that sentence should not be meted out unless the person concerned is heard. This is an issue of fairness to be accorded a person before sentencing. Especially when the disciplinary action taken, as earlier stated, was with the view to dismissing him or to reduce his rank. Had
B the right to mitigate been afforded, there is always the possibility that he might not be dismissed from service. The fact is before the sentence to dismiss him was made, he was not asked to mitigate. Rightly, the decision of the First respondent ought not to stand based on this reason too. Thus, even if it may be right to maintain that an inferior tribunal has the right to sentence as it wishes, before that right is exercised, the person
C facing that tribunal must be given the right to mitigate.

[74] I would adopt the above and am of the opinion that not having given the applicant the right to mitigate in this case is another reason why the decision to dismiss the applicant ought to be quashed.

D **[75]** On the issue of proportionality of the punishment of dismissal for her alleged misconduct, the applicant contends that bearing in mind her length of service of 16 years and unblemished record, the punishment of dismissal was unduly harsh. Reliance was yet again placed on the decision of the Court of Appeal in *Nazrul*'s case which concluded that the alleged misconduct there
E did not justify dismissal and was disproportionate and unreasonable considering Nazrul's good employment track record over eight years.

[76] The law as it currently stands relating to the issue of proportionality of punishment in dismissal cases appears to draw a distinction between those employed in the public sector and those employed in the private sector. The
F effect of the Federal Court's decision in the case of *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409; [2013] 6 MLJ 605 is that the doctrine of proportionality of punishment is applicable to dismissal cases relating to private sector employees that are normally adjudicated in the Industrial Court pursuant to the Industrial Relations Act 1967. As such, it is not
G uncommon to see orders of dismissals of private sector employees being struck down on this ground alone *ie*, the dismissal order too harsh. Back wages however may be significantly reduced on account of contributory conduct.

[77] However, in so far as dismissal of those employed in the public sector,
H the Federal Court in the case of *Ng Hock Cheng v. Pengarah Am Penjara & Ors* (*supra*) has authoritatively held that the court should not intervene on the punishment meted as the employer is best placed to judge the seriousness of the misconduct and therefore the appropriate punishment.

[78] In my view, whilst the general principles applicable in judicial review
I proceedings make no distinction between decisions made in the public sector from those in the private sector, it is indeed peculiar that there is still to be

maintained such a distinction when it comes to the issue of proportionality of punishment. Whilst I would subscribe to the view adopted by the Court of Appeal in *Nazrul*'s case that proportionality of punishment can and should also be considered by a court in dismissal cases of public officers, judicial discipline and *stare decisis* dictates that the principle laid down by the Federal Court is in *Ng Hock Cheng* be adhered to. Perhaps the time is right for the Federal Court to revisit this issue of the court's intervention where there is disproportionality of punishment of employees in the public sector. This more so when Lord Diplock's speech in the *CCSU* case held that a tribunals decision was questionable on the ground of proportionality. In my considered view, should there be a situation where a public servant is dismissed for what may clearly be viewed as a minor transgression for which the punishment of dismissal would be what I describe as "shocking the conscience", then the court should be entitled to intervene to make right the injustice.

[79] In this regard, I find guidance in a 2006 High Court decision of Mohamad Ariff Yusof J (as His Lordship then was) in the case of *Yahaya Talib v. Southern Bank & Anor* [2009] 1 LNS 1785 (KLHC case No. R3-25-350-2006.) Although it was a decision relating to a judicial review application against an Industrial Court Award pertaining to an employee in the private sector, I find the views of His Lordship on the issue of proportionality in that case interesting and persuasive. Firstly, reference was made to the Indian decision in *Dev Singh v. Punjab Tourism Development Corporation Ltd & Anor* [2003] AIR 3712 SC where it was held as follows:

> ... The court sitting in appeal against a punishment-imposed in... disciplinary proceedings will not normally substitute its own conclusion on penalty. However if punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court, then the court would appropriately mould the relief either by directing the disciplinary/ appropriate authority to reconsider the penalty imposed ... it is also clear from the...judgments of this court, if the punishment imposed by the disciplinary authority is totally disproportionate to the misconduct proved against the delinquent officer, then the court will interfere in such a case.

[80] The court in the *Yahaya Talib*'s case also referred to the decision of the Constitutional Court of South Africa in *Z Sudimo & Anor v. Rustenburg Platinum Mines Ltd & Ors* [2007] ZACC 22 which had held as follows:

> [72] in deciding how commissioners [the South African equivalent of the Industrial Court] should approach the task of determining the fairness of the dismissal, it is important to bear in mind that security of employment is a core value of the Constitution ... This is the protection afforded to employees who are vulnerable. Their vulnerability flows from the inequality that characterises employment in modern developing economics ...

A [75] It is a practical reality that in the first place it is employer who hires and fires. The act of dismissal forms the jurisdictional basis for a Commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA (the South African Labour Relations Act). The Commissioner determines whether the dismissal is fair. There are therefore no competing "discretions" Employer and
B commissioner each play a different part ... the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the Commissioner sense of fairness is what must prevail and not the employer's view. An impartial third-party determination on whether or not a dismissal is fair is likely to promote labour peace ...

C [77] Employees are entitled to assert their rights ... The state is obliged to provide the means to ensure that constitutional and labour law rights are protected and vindicated.

[81] In Malaysia, it has been held by the Court of Appeal that the expression 'life' as appearing in art. 5(1) of the Federal Constitution does not
D refer to mere existence but encompasses the right to continue in public service and to be engaged in gainful employment subject to removal for good cause by resort to a fair procedure, see Gopal Sri Ram JCA in the case of *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771; [1996] 1 MLJ 261.

E **[82]** In the case at hand, as I have decided earlier that the decision to dismiss cannot stand on the grounds that no reasons have been given as well as the absence of any evidence of the alleged misconduct rendering the decision irrational, I will thus not embark on the exercise of deciding whether or not the punishment of dismissal meted on the applicant was
F proportionate or otherwise.

Conclusion/Order

[83] In the final analysis, upon a careful scrutiny and judicious consideration of the facts of this case and the applicable law as I have set out,
G I have no hesitation in granting an order of *certiorari* to quash the decision of the first respondent which dismissed the applicant from the second respondent's services on the 9 July 2020.

[84] What then remains is the remedy to the applicant and or the consequential order that should be made. It is trite law that it is for the court
H to mould the appropriate relief which in its view would meet the ends of justice and the court by virtue of O. 53 r. 2(3) of the ROC is not confined to the relief claimed by the applicant. The applicant has prayed for a declaration that her dismissal and termination is not valid and not effective and that she is still an employee and entitled to all salaries and benefits
I eligible to be received.

[85] At first blush, making such a declaration as prayed for would appear to in effect be ordering the reinstatement of the applicant which is not permissible by reason of the provisions of the Specific Relief Act 1950. However, this issue was extensively discussed by the Federal Court in the recent decision in the case of *Mohd Sobri Che Hassan v. Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor* (*supra*). In that case, the Court of Appeal had made a similar declaration upon quashing a dismissal order. The issue before the Federal Court was whether the relief of specific performance or reinstatement was available to the dismissed employee. After discussing and considering various case law, the Federal Court concluded that the granting of a writ of *certiorari* is not the same as reinstatement as the quashing of a decision would effectively mean that the employee was deemed to continue working at the place where he was dismissed. The Federal Court however emphasised that it is not in all cases that an unlawfully dismissed employee is entitled to continue working at the same place and depends entirely on the facts of each case. On the facts of that case, the Federal Court was of the view that damages should be awarded instead as 'reinstatement' was not warranted due to the fact that the employee and employer there were still involved/entangled in several other legal suits pending between them.

[86] On the facts of this case, I see no reason not to make the declaration prayed for by the applicant. The respondents have not made any submissions as to why such declaration ought not be made or why 'reinstatement' is unwarranted. In fact, I note that in *Nazrul*'s case (*supra*), that was exactly the declaration made by the Court of Appeal.

[87] As such, as a consequence of issuing the writ of *certiorari*, I would also grant the declaration as prayed for by the applicant herein.

[88] As for costs, I would order the respondents to pay the applicant costs of RM10,000 subject to allocator.